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No. 97-786

In The

Supreme Court of the United States

October Term, 1997

ROBIN CLIFTON AND MAINE RIGHT TO LIFE COMMITTEE, INC.,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioners Robin Clifton and Maine Right to Life Committee, Inc. (hereafter "MRLC") brought this suit to protect MRLC's right as a corporation to publish (and Clifton's right to receive) "voter guides" containing "issue advocacy." That right, though protected by this Court's decision in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 248-249 (1986) ("*MCFL*"), is infringed by 11 C.F.R. § 114.4(c)(5) (effective March 13, 1996), a regulation promulgated by the Respondent Federal Election Commission (FEC). MRLC challenged the regulation on the bases of "overbreadth" and "vagueness."[1] Verified Complaint (V.C.) ¶ 52 *et seq.*

The district court invalidated the entire regulation due to its "overbreadth," but did not reach the "vagueness" claim. Petitioners' Appendix (Pet. App.) 77-78. Among the provisions which the district court invalidated on overbreadth grounds were those which prohibited corporations from publishing voter guides which contained "electioneering messages."

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[1] The distinction between "overbreadth" and "vagueness" is crucial to the instant controversy. MRLC's overbreadth claim is that the FEC's regulation prohibits more speech than is permissible under this Court's holding in *MCFL*, specifically, that it prohibits corporate "issue advocacy" whereas the constitutional limit of the FEC's statutory authority is the prohibition of corporate "express advocacy." V.C. ¶¶ 62-65. MRLC's (alternative) "vagueness" claim is that the regulation does not give adequate notice of what it prohibits and therefore would result in arbitrary and discriminatory enforcement, denying MRLC due process of law. V.C. ¶¶ 76-85.

Speaking of those provisions, the district court stated that

> [e]ven written contact with candidates results in *severe constraints on issue advocacy, id.* § 114.4(c)(5)(ii), otherwise entitled to broad protection under the teachings of *Buckley* and *MCFL*.

Pet. App. 71 (emphasis added).

The court of appeals "modified" the decision of the district court. The court of appeals held that

> the voter guide regulation, *id.* § 114.4(c)(5) is declared invalid *only insofar as* it limits any contact with candidates to written inquiries and replies and imposes an equal space and prominence restriction.

Pet. App. 18-19 (emphasis added). Thus, the court of appeals rejected the district court's holding that the "electioneering message" provisions were invalid due to overbreadth. It did so because of a misunderstanding of *MCFL*.

In *MCFL*, this Court held that corporate expenditures for issue advocacy constituted protected speech; the Court also held that corporations possessing certain features (the "*MCFL* features") had the additional right to make expenditures for "express advocacy." *MCFL*, 479 U.S. at 248-249 and 263-264. The court below mistakenly believed that MRLC did not have the right to engage in "issue advocacy" because it did not possess all of the *MCFL* features. Pet. App. 7-9. Therefore, it rejected the district court's invalidation of the "electioneering message" provisions (although it held two other provisions invalid for other reasons). Pet. App. 9-16.

Before the court of appeals' decision, MRLC and all other corporations unquestionably had the right to make expenditures for "issue advocacy" *regardless of whether they possessed the three MCFL features. MCFL*, 479 U.S. at 248-249. Such is the square holding of *MCFL*. *Id.* After (and as a direct result of) the court of appeals' decision, corporations which do not possess the *MCFL* features are *prohibited* from making issue advocacy expenditures which would qualify as "electioneering messages" – *despite the contrary holding of the MCFL Court*. The court of appeals has directly contradicted this Court's precedents, and, in the process, has effectively prohibited the exercise of a right (to engage in unrestricted issue advocacy) which MRLC undeniably possesses. And it has made that unlawful prohibition impervious to any remedy except this Court's review. Therein lies MRLC's grievance against the decision below and a sufficient reason for this Court to grant the Petition.

ARGUMENT

I. THE FEC AGREES WITH MRLC THAT THE COURT BELOW ERRED.

The FEC believes that the opinion of the court below was erroneous; inexplicably, the FEC nonetheless opposes granting MRLC's Petition (Pet.). As is demonstrated in the Petition (and as the FEC agrees), the court of appeals fundamentally misunderstood and contradicted this Court's analysis in *MCFL*. Pet. App. 17-20. In that case, this Court announced two distinct holdings: the first protected the "issue advocacy" of *all* corporations by

incorporating the "express advocacy" test of *Buckley v. Valeo*, 424 U.S. 1, 43-44 and n.52; 79-80 (1976) (*per curiam*) ("*Buckley*") against the prohibition of corporate expenditures in 2 U.S.C. § 441b; the second protected "express advocacy" expenditures of *only certain* corporations, *i.e.*, those which possessed the three "*MCFL* features."[2] As is also demonstrated in MRLC's Petition, the court of appeals' misreading of *MCFL* directly caused the error in its judgment, specifically, its reversal of the district court's holding that the "electioneering message" provisions of the FEC's regulation were invalid on the basis of overbreadth.[3] Pet. 20-23.

In this regard, the FEC has two quibbles with MRLC's argument. First, the FEC denies MRLC's assertion that the "express advocacy" standard is "constitutionally compelled." Brief for the Respondent in Opposition ("Resp. Br.") 9 n.3. This is a red herring: whether the narrowing construction imposed by the *MCFL* Court on § 441b is "constitutionally compelled" is, for present purposes, beside the point. To people who

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[2] Twice in its Brief for the Respondent in Opposition ("Resp. Br."), the FEC clearly demonstrates that it recognizes and understands the court of appeals' error. Resp. Br. at 3 and 9 n.3.

[3] As MRLC shows below, the court of appeals entered a final judgment, reversing the holding of the district court that the "electioneering message" provisions were infirm on "overbreadth" grounds. The court remanded to the district court not the broader question of whether the "electioneering message" are "valid," but *only* the narrower question of whether they survive MRLC's "vagueness" challenge. Pet. App. 16-19.

wish to exercise their right of free speech, it is inconsequential whether a decision which protects their freedom announces a "First Amendment right" or (in the FEC's phrase) a "construction of the statute which was clearly informed by constitutional concerns."[4] *Id.* It is a distinction without a practical difference. Whichever way it is characterized, this Court's decision in *MCFL* manifestly protects MRLC's right to make expenditures for issue advocacy without FEC interference. As the FEC concedes,

> even if a corporation does not qualify for the "*MCFL* exemption" . . . , Section 441b does not prohibit it from making independent disbursements for campaign-related speech, so long as that speech does not include 'express advocacy' of particular electoral results.

Id. Directly contrary to the above statement, the court of appeals' decision upheld the "electioneering message" prohibitions against MRLC's "express advocacy" challenge despite the fact that the court felt itself "entitled to assume that 'electioneering message' has a different, broader meaning" than "express advocacy." Pet. App. 17.

Second, the FEC contends that the court of appeals' opinion can be read broadly as having "reserved" rather than having decided "the question whether corporations have a First Amendment right to engage in independent campaign-related issue advocacy." Resp. Br. 9 n.3. But the court below may not purport to "reserve" judgment on

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[4] However, suppose for the sake of argument that the FEC is right, and this Court has *not* squarely held that the express advocacy test is constitutionally compelled and that this would make a difference in determining the legitimacy of the court of appeals' opinion. If so, that constitutes an additional reason *in favor of* granting the petition, not an argument against review.

an issue that has already been decided by this Court. Again, whether or not it is characterized as "constitutionally compelled," the holding of *MCFL* is clear: corporate expenditures for issue advocacy may not be prohibited. This Court has decided the issue; it may not be revised by an inferior court.

Thus, the decision below does not suffer from "imprecision," as the FEC suggests: rather, it is flat wrong. Resp. Br. 9. As MRLC has shown, it conflates two holdings of *MCFL* into one which, beyond cavil, misunderstands and contradicts one of the central speech-protective holdings of *MCFL*. Thus, the FEC's attempts to resuscitate the court of appeals' holding through an indulgent interpretation are unavailing. In sum, the parties agree on the fundamental fact that the court of appeals misread this Court's precedents, notwithstanding the FEC's attempts to mitigate this mistake by giving a niggardly reading to *MCFL* and a charitable reading to the opinion of the court below.

II. CONTRARY TO THE FEC, THE COURT OF APPEALS ENTERED A FINAL JUDGMENT ON MRLC'S OVERBREADTH CLAIM. IN DIRECT CONTRAVENTION OF THIS COURT'S PRECEDENTS, THAT JUDGMENT PROHIBITS CORPORATIONS FROM ENGAGING IN ISSUE ADVOCACY.

As demonstrated above, a fair reading of the FEC's Brief shows that the FEC substantially agrees with MRLC that the analysis of the court below was erroneous. But the FEC attempts to distinguish between the court's analytical errors and its *judgment*, as if the two were unrelated. Resp. Br. 10.

The decision below on the "electioneering message" provisions was not *interlocutory* as the FEC contends. Rather, the court of appeals finally determined the issue of whether those requirements were beyond the statutory authority of the FEC (*i.e.*, whether they suffered from "overbreadth" under *MCFL*). This holding stemmed directly from the court of appeals' faulty premise. It was precisely because the court of appeals began with the false assumption that *MCFL* protects the issue advocacy of only corporations with the *MCFL* features (coupled with the fact that MRLC does not possess one of those features) that the court sought alternate grounds for resolving the case. It found that two other provisions could be resolved on such alternate grounds, but (apparently) that the "electioneering message" provision could not be determined on either of those bases.

As explained in the Petition, MRLC challenged the entire regulation on overbreadth grounds, and the district court had held the entire regulation (including the "electioneering message" provisions) invalid on that basis. Pet. 11 n.13; V.C. ¶¶ 62-63. But the court of appeals, due to its profound misunderstanding of the holding in *MCFL*, ruled against MRLC on its overbreadth claim with respect to those provisions. Thus, the court of appeals' decision constituted a reversal of the trial court's holding that those provisions were invalid on overbreadth grounds. Although the opinion does not explicitly so state, the conclusion that the court of appeals upheld the "electioneering message" provisions as against MRLC's overbreadth challenge is inescapable. The opinion clearly indicates that the court did not remand the case for a consideration of MRLC's overbreadth claim, but only for

a determination of whether the "electioneering message" provisions were unconstitutionally *vague*., Pet App. 16-19. Upon remand, therefore, the district court is limited under the "law of the case doctrine" as to the extent of relief that it may grant. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988). It may determine only whether the electioneering message provisions are vague, not whether they are overbroad. Although it could conceivably invalidate the provisions on vagueness grounds, it might not. If it does not, the holding that they are not invalid for overbreadth will be the law of the case. MRLC will then be foreclosed from re-litigating that issue until the case wends its way back to this Court. This result obtains *despite the fact that the court which upheld the challenged provisions did so in direct contravention of this Court's precedents*. In the meantime – including the federal election year of 1998 – corporations such as MRLC will be prohibited from publishing voter guides containing issue advocacy.

III. ALTHOUGH MRLC PREVAILED ON CHALLENGES TO TWO PROVISIONS OF THE REGULATION, ITS SPEECH IS STILL SEVERELY RESTRICTED BY THE PROVISIONS WHICH THE COURT BELOW UPHELD IN THE FACE OF MRLC'S OVERBREADTH CHALLENGE.

The FEC states that MRLC "substantially" prevailed in this case since the court of appeals struck down two out of three provisions of the challenged regulation. Resp. Br. 8. The tacit suggestion is that MRLC ought to be happy that its speech is only prohibited by one provision rather than by three. But what comfort can MRLC take in

the fact that it may not now be required to contact candidates only in writing, or that it may not now be required to give equal space and prominence to candidates listed in its voter guides, when, as a result of the same judicial decision, it *may* be required to limit its voter guides in another way which is every bit as onerous? The end result for MRLC (and for all corporations) is the same: its members cannot go forward with the speech they had intended to make unless they are willing to submit to the FEC's "electioneering message" restriction – a restriction which, because it is overbroad (*i.e.*, prohibits a substantial amount of protected speech), directly violates this Court's speech-protective jurisprudence. Thus, speech about candidate's and political issues which would have been contained in MRLC's voter guides – the very speech this Court has said is entitled to the "broadest protection" because it is a bulwark of representative democracy – will be stifled, and MRLC's central educational purpose will be frustrated. *Buckley*, 424 U.S. at 14 and 49 n.55; V.C. ¶ 9.

IV. THIS CASE CONCERNS THE ABILITY OF REAL PEOPLE TO EXERCISE THEIR PRECIOUS RIGHT TO FREE SPEECH.

Behind the facade of technical terminology, behind "express advocacy" and "issue advocacy," behind "electioneering messages," "overbreadth" and "vagueness," this case is really only about the right of citizens to speak their minds on political issues. It is about real people who have established an association in corporate form in order to communicate about candidates and issues in the context of federal elections. They are not unique in this respect; rather, theirs is but one of countless corporate

associations representing all points on the spectrum of political belief and formed for the purpose of "amplifying the voice of their adherents." *Buckley*, 424 U.S. at 22. These citizens' groups – however diverse their political views – have this in common: they want to exercise their right to political speech free from governmental interference.

The court below, however, by directly contradicting this Court's speech-protective precedents, will have succeeded in confining the speech of all such corporate issue-oriented groups within highly restrictive boundaries during the upcoming election year, the very time when such speech is most crucial. In upholding the "electioneering message" provisions of the FEC's regulation against MRLC's overbreadth challenge, it has significantly diminished the "breathing space" which this Court recognizes as vital to the exercise of free speech. *Id.* at 41 n.48.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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